SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No._____

CITY OF VERO BEACH, a Municipal Corporation organized and existing under the Laws of the State of Florida,

Petitioner,

vs.

THE RITTENOURE INVESTMENT COMPANY, a Corporation organized and existing under the Laws of the State of Florida,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Reference to Opinion of Court Below

The opinion of the Court below (R. 25) is reported in 113 F. (2) 269, (Adv. Sh.).

NOTE: Unless otherwise shown, all emphasis indicated is supplied.

II.

Grounds of Jurisdiction

The jurisdiction of this Court to review this cause is predicated upon 28 U. S. C. 347, and upon Rule 38 (5) of the Supreme Court Rules, upon the ground that the Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions; has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit, that of the Fifth Circuit; and upon the further ground that should this Court, pursuant to the writ of certiorari which it has granted in the case of *American United Mutual Life Insurance Company vs. City of Avon Park,* No. 31, October Term, 1940, uphold the validity of a substantially identical fiscal agency contract, the right of review of Petitioner will have been denied.

III.

Statement of the Case

Based upon the breach of a fiscal agency contract (R. 8), action was filed in the District Court of the United States for the District of Kansas, Second Division, which, after a skirmish of pleading, resulted in the entry of final judgment dismissing the cause with prejudice (R. 18), from which appeal was taken to the Circuit Court of Appeals of the Tenth Circuit (R. 19).

The Circuit Court of Appeals, in the light of the decision of the Supreme Court of Florida, in *Taylor vs. Williams,* . . . Fla. . . ., 195 So. 175, rendered February 23, 1940, held the fiscal agency contract lacking in mutuality and concluded the City could not maintain an action for its breach. Its opinion is predicated solely upon this ground, and it holds that the District Court had predicated its opinion on erroneous grounds.

The fiscal agency contract (R. 8) constituted the appointment of the Respondent here as the fiscal agent and representative of the City to work out for it a refinancing and refunding of its total outstanding debt, and set forth the terms upon which such obligations would be refunded. The fiscal agent positively agreed "to effect the exchange of said refunding bonds and have the said refunding bonds printed, duly validated and to bear all cost of same, for which at the time of exchange the City of Vero Beach is to pay us $2.50 per thousand so exchanged." (R. 8).

In addition to the above compensation, the fiscal agent was to recei additional payments out of the handling of the delinquent interest coupons to be received from the creditors. The sinking fund provisions were agreed upon, and the fiscal agent likewise guaranteed as follows:

> "The undersigned agrees that it will have in its hands for refunding 75 per cent. of each class of the indebtedness of said City to be refunded hereunder by October 1, 1935, and that should it fail to so do, that this agreement will then terminate and be at an end and the City's liability cease thereunder, * * *." (R. 9).

By resolution of the City Council, the contract was extended to April 1, 1936 (R. 10).

The District Court held that the contract did not constitute a binding and absolute promise to perform by a given time and to the extent set forth, but was in the nature of a "best efforts" arrangement, and therefore no action for its breach could be maintained. The Circuit Court of Appeals held that the decision of the lower court (R. 25) was "predicated upon erroneous grounds", thus implying that but for its construction of the applicable local law as to invalidity of the contract the decision of the District Court would be reversed.

IV.

Specifications of Errors Intended to be Urged

1. That the Circuit Court of Appeals decided an important question of local law in a way in conflict with applicable local decisions in its holding that under Florida law the fiscal agency contract is void and unenforceable.

2. That the Circuit Court of Appeals of the Tenth Circuit rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit on the question of law involving the same matter.

V.

ARGUMENT

1. Petitioner contends that the Circuit Court of Appeals erred in its application of the local law of Florida in holding on the authority of the decision in *Taylor vs. Williams*, . . . Fla. . . , 195 So. 175, that the fiscal agency contract involved is void and unenforceable under Florida law.

Evidently the Circuit Court of Appeals did not have before it the later opinions and modifications in the Taylor litigation. On rehearing, the Supreme Court of Florida, in *Taylor vs. Williams*, 195 So. 184, in referring to its opinion reported in 195 So. 175 (upon which latter opinion the Circuit Court of Appeals relied) said:

> "The opinion in the Taylor case holds that the 1935 refunding contract, resolution and bonds, and the 1939 refunding contract and resolution *contain illegal provisions that should be eliminated*, viz: provisions as to deferred interest coupons on refunding bonds; pledge of resources not contained in the original bonds; *use of interest and sinking funds in paying fees, commissions or expenses for refunding purposes.*"

The special concurring opinion of Mr. Justice Buford accompanying the opinion on rehearing, 195 So. 186, shows rather conclusively that the only matter involved was a provision in the fiscal agency contract proposing to pay refunding fees out of interest and sinking fund moneys. A still further opinion in the Taylor litigation was rendered and is reported in 196 So. 214, which shows conclusively that the Supreme Court of Florida did not hold the contract void as a matter of law, but merely was passing upon the question of pleading at an interlocutory stage in the proceedings, and held that the bill of complaint required an answer and the making up of proper issues of fact.

In other words, the Taylor litigation, as fully and finally reported, does not furnish the predicate for holding invalid and enforceable a fiscal agency contract of the nature involved; nor does it hold that even the fiscal agency contract involved in that litigation constituted an illegal delegation of official governmental powers; nor does it constitute an authoritative decision as to cities or towns which are governed by entirely different laws than those applicable to counties and boards of public instruction.

The litigation involving the Taylor decisions concerns only a county or board of public instruction governed by constitutional and statutory provisions entirely different than those relating to cities and towns. Furthermore, the City of Vero Beach is governed by a definite Charter Act of the Legislature, to-wit, Chapter 14439, Laws of Florida, Special Acts of 1929, which provides in Section 8 thereof that the corporate authority should be vested in the named officers, and that "the City

Council is hereby authorized and empowered to create, by ordinance, such other and additional officers, with such powers and duties as it deems advisable." Section 32 of the same Charter Act specifically provides:

> "The City Council shall have the power and is hereby authorized to create by ordinance such additional officers and provide for the election or appointment of additional officers or employees as it may in its judgment deem necessary. * * *."

Thus is granted by applicable Florida law express authority to employ a fiscal agent under contract, and, where the Charter Act so contemplates, the Supreme Court of Florida definitely held, in *Pierce vs. Isaac*, 134 Fla. 666, 184 So. 509, as follows:

> "* * * but the sole question presented on this record, in absence of allegations of fraud, bad faith or improper conduct on the part of the members of the Board of Bond Trustees of the District, is whether or not they had the power under the law to pass the necessary resolution and enter into the contract dated September 1, 1938. We think the Board of Bond Trustees had the power and authority to enter into the contract for the purpose of perfecting an extension of time of payments of the bonds now before us whereby a savings of $411,550. can be obtained for the District by entering into the agreement for a refund thereof."

Not only is the General Refunding Act of 1931, Chapter 15772, Laws of Florida, Acts of 1931, (which is applicable to cities and districts) but likewise the Charter Acts of the District, cited as authority.

Cf. *Bryan vs. City of Miami*, 139 Fla. 650, 190 So. 772.

Thus the most that can be said of the decisions in the Taylor litigation is that the same are applicable solely to counties or boards of public instruction; that they do not hold the contracts void, but merely hold unenforceable certain provisions thereof; that they are not applicable to cities or towns; and that at most, they are merely interlocutory decisions discussing questions of pleading. It is specifically recognized by the Supreme Court of Florida in the Taylor litigation, supra, that it is competent to employ agents or employees, and that such may be compensated in the manner provided for as the law authorizes.

It is significant also that the fiscal agency contract involved in the suit at bar neither provided for payment of any fees out of the bond interest and sinking fund, nor did it in any manner delegate to the fiscal agent any of the official functions involved, but, on the contrary, it would be essential that the City itself authorize such bonds, its officials execute the same, and the validation proceedings be prosecuted in its name, solely by its authority.

If the basis of the decision in the Taylor litigation is predicated upon the fiscal agent being a foreign corporation, then there has been an unconstitutional discrimination between foreign and domestic corporations contrary to the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States. This specific matter, namely, being a foreign corporation, is particularly recognized by the Circuit Court of Appeals below.

2. Petitioner contends that the Circuit Court of Appeals of the Tenth Circuit rendered a decision in conflict with the

decision of the Fifth Circuit Court of Appeals within the latter jurisdiction of which Florida lies.

In two cases, the Circuit Court of Appeals of the Fifth Circuit has had before it a fiscal agency contract virtually identical with the one involved in the Taylor litigation, supra, and insofar as material, identical with the one in the suit at bar. Both involved cities and both were held valid, and in proceedings under Chapter IX of the Bankruptcy Act, were given effect. *Vallette vs. City of Vero Beach,* (C. C. A. 5) 104 F. (2) 59, 124 A. L. R. 686, (Cert. den. October 9, 1939, 84 L. Ed. 87). *American United Mutual Life Insurance Co. vs. City of Avon Park,* 108 F. (2) 1010, (Cert. granted, April 22, 1940, No. 31, October Term, 1940).

3. Writ of certiorari having been granted in *American United Mutual Life Insurance Co. vs. City of Avon Park,* No. 31, October Term, 1940, if this Court should hold that the fiscal agency contract involved therein is valid, Petitioner herein would be denied an enforceable contract right with the time for review having expired.

A reference to the record in the Avon Park case, supra, now pending in this Court, will show that the primary attack made is upon the validity of a fiscal agency contract for material purposes identical with the one in the suit at bar, and such attack is likewise predicated solely upon the Taylor litigation, supra. Therefore, to preserve the rights of Petitioner to a review, should this Court on the merits determine that such contracts are valid under Florida law, it is essential that this writ of certiorari be granted.

CONCLUSION

In conclusion, it is submitted that the writ of certiorari should be granted because of the error in applying local law; because of the conflict between the decisions of the Circuit Courts of Appeals of the Tenth and Fifth Circuits; and, because of the granting of the writ of certiorari and the pending decision of this Court in American United Mutual Life Insurance Co. vs. City of Avon Park.

Respectfully submitted,

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